Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 75-1108

JERRY JAMES BORDEAUX,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____

_____

Petitioner, Jerry James Bordeaux, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered November 12, 1975, rehearing and request for hearing in banc denied, January 7, 1976.

OPINION BELOW

The Court of Appeals entered its unpublished memorandum decision No. 75-2291, on November 12, 1975. A copy of the opinion is attached as Appendix A. Petition for Rehearing and Request for Hearing in Banc were denied on January 7, 1976. A copy of the order denying the petition for rehearing and request for hearing in banc is attached as Appendix B.

JURISDICTION

On November 12, 1975, the United States Court of Appeals affirmed the conviction of petitioner for possession of marijuana with intent to distribute (Appendix A). Rehearing and request for hearing in banc were denied on January 7, 1976. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Was the information known by U.S. Customs agents at the time of their detention and arrest of petitioner sufficient to constitute "founded suspicion" or probable cause to justify such action?

II. Can the detention and search of the boat be justified as a valid border search where the U.S. Customs agents had no information that petitioner's boat or any of the co-defendants had left the territorial limits of the United States?

III. Was the evidence presented sufficient to support the finding of petitioner's guilt where customs agents observed him merely driving a truck and trailer to San Diego Bay whereupon two co-defendants loaded a boat onto the trailer which was subsequently found to contain contraband?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

This is an appeal from an affirmation of a judgment of conviction by the Circuit Court of Appeals for the Ninth Circuit of petitioner Jerry James Bordeaux for possession of a controlled substance, marijuana, with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

On August 14, 1974, the Grand Jury for the Southern District of California

returned a four count indictment against petitioner Bordeaux and two co-defendants.

On October 21, 1974, petitioner filed his motion to suppress evidence as having been seized without probable cause, (Clerk's Record, hereinafter C.R., p. 10-14), with the government filing its motions in opposition on November 4, 1974 (C.R., 16-19).

On November 18, 1974, after receiving sworn testimony and arguments by counsel in support and opposition of the motion to suppress, the Court denied said motion. (C.R., 20)

Following petitioner's execution of a "Waiver of Trial by Jury and Waiver of Special Findings of Fact" on March 11, 1975, the various parties agreed to proceed by way of a stipulated facts trial. (C.R., 22-23) Stipulations as to the nature of the contraband (marijuana) and the chain of custody were entered into, as well as stipulations that the court could consider the evidence presented at the hearing on the motion to suppress.

On March 11, 1975, the court found petitioner Bordeaux guilty of Count Four as set forth above and later sentenced him to the custody of the Attorney General for a period of three years pursuant to 18 U.S.C. 4208(a)(2). Additionally, a five year term of special parole was prescribed under 21 U.S.C. 841(b)(1)(B). (C.R., 24) Petitioner filed notice of appeal on May 19, 1975, and was allowed

to remain at liberty on the original bond.

On November 12, 1975, the United States Court of Appeals for the Ninth Circuit affirmed the petitioner's conviction (Appendix A) and on January 7, 1976, denied petitioner's Petition for Rehearing and Request for Hearing in Banc (Appendix B).

STATEMENT OF THE FACTS

On the 26th of July, 1974, Agent Clyde Burnett of U.S. Customs, CPO Unit, San Diego, California, was on duty in the area of Shelter Island in San Diego Bay. At this time, he noticed a boat being launched into the water with one occupant aboard. The boat's trailer and towing vehicle, a Chevrolet Blazer, then went to one of the nearby marinas and picked up the driver of the boat rather than leaving Shelter Island. (Reporter's Transcript, hereinafter R.T., p.6, 1.6) Agent Burnett testified that the two men were in their middle and late twenties (R.T., p. 10, 1.6). Petitioner Bordeaux was 35 years old, his date of birth being March 1, 1939.

Agent Burnett never saw the boat taken out of the water, but had seen it launched on other occasions. (R.T., p. 6, 1. 20) Agent Burnett's workday was from 8:00 A.M. to 4:00 P.M. (R.T., p. 34, 1. 11) A check of the boat registration number revealed it was registered to petitioner Bordeaux, (R.T., p. 8, 1. 3 and p. 9, 1. 25) who resided at 925 South Magnolia,

El Cajon, California (R.T., p. 36, 1. 8). The towing vehicle was also registered at the same address, to Willford and Elizabeth Bordeaux (R.T., p. 35, 1. 5).

The boat was described as a high speed open boat with an inboard engine and outboard drive (R.T., p. 10, 1. 9 and 1. 12) registered on July 19, 1974 (R.T., p. 29, 1. 1) one week before Agent Burnett's initial observation. The boat had a slip rented by the month at the Voyager Marina in San Diego Bay (R.T., p. 7, 1. 11).

Agent Burnett subsequently inspected the boat in its berth at the Marina (R.T., p. 10, 1. 25), and described it as a new boat (R.T., p. 27, 1. 9). There was no contraband seen on or near the boat (R.T., p. 28, 1. 4). There was nothing unusual about the boat (R.T., p. 28, 1. 7). There had been no alterations or modifications to enable the boat to carry contraband (R.T., p. 28, 1. 11). Agent Burnett observed nothing suspicious about the boat except that it was very clean (R.T., p. 28, 1. 17). He further testified that it was not unusual to keep a new boat clean (R.T., p. 28, 1. 22). Agent Burnett further testified that it is necessary to have a new boat taken out of the water to have it serviced on a regular basis.

The name "Bordeaux" was run in the computer and came back a "hit" (R.T., p. 8, 1. 14) indicating that he had been involved in an Arizona case (R.T., p. 9, 1. 1) which was adjudicated as a misdemeanor. (R.T., p. 33, 1. 13)

The boat was never seen engaging in any activity connected with narcotics or dangerous drugs or the smuggling of any type of merchandise (R.T., p. 39, l. 22). In fact, the boat was never seen outside of San Diego Harbor, nor was there ever any information that the boat actually left the harbor (R.T., p. 39, l. 1 and R.T., p. 43, l. 8) or the continental territory of the United States (R.T., p. 43, l. 23).

Agent Burnett testified that both the slip where the boat was docked and the "J" Street ramp where the boat was subsequently seized are in San Diego Bay, and further that it is not necessary to leave the United States to go from one to the other. (R.T., p. 45, l. 8)

Southern California is a most popular boating area, (R.T., p. 40, l. 11) with tens of thousands of privately owned pleasure boats. At approximately 7:00 P.M. on August 3, 1974, Agent Burnett noticed petitioner's boat was gone from its slip at the Marina. He then sent agents to the Lemon Street address in La Mesa to watch the Chevrolet Blazer and trailer. At approximately 11:00 P.M., the Blazer and trailer left the La Mesa address and went to a "J" Street launching ramp in Chula Vista, adjacent to San Diego Bay. The Blazer and trailer circled two or three times and then left and drove around Chula Vista before returning to the ramp. Shortly thereafter, the Blazer and trailer returned to the La Mesa address. (R. T., p. 12, l. 18)

Sometime after 12:00 midnight, August 6, 1974, petitioner's boat arrived at the "J" Street ramp (R.T., p. 3, l. 4) with two individuals aboard. One remained on board while the other walked up "J" Street to a telephone booth on Broadway, made a phone call and started to return to the boat. (R.T., p. 15, l. 12)

The Blazer and trailer arrived at the ramp while the telephone caller was walking back to the boat. At this time, the Blazer was being driven by petitioner Bordeaux. Prior to this time, petitioner had not been identified as the driver of the Blazer. (R.T., p. 46, l. 20)

The boat was loaded on the trailer and pulled partially out of the water. The trailer had a flat tire and the boat was started back towards the water when Agent Burnett ordered all co-defendants to cease further activity. (R.T., p. 16, l. 20)

Petitioner Bordeaux was never seen aboard the boat by either Agent Burnett or any other agent. In fact, petitioner Bordeaux never left the vehicle until ordered to do so by the agents. (R.T., p. 51, l. 21) Agent Burnett was also satisfied that petitioner Bordeaux had not been outside the United States. (R.T., p. 52, l. 3) Petitioner Bordeaux was cooperative at all times in every way, never attempting to run or flee or take other evasive action. (R.T., p. 54, l. 2)

At no time did the customs agents have or seek an arrest or search warrant.

(R.T., p. 29, l. 1) A search of the boat was then conducted and revealed marijuana. (R.T., p. 17, l. 6)

REASONS FOR GRANTING THE WRIT

I

The affirmation of a stop and detention based upon less than a founded suspicion is offensive to the requirements of the Fourth Amendment and previous Supreme Court decisions.

The Supreme Court has made it clear that while evidence which would establish defendant's guilt at trial is not necessary in order to arrest or search, "common rumor or report, suspicion, or even strong reason to suspect" will not suffice. Henry v. United States, 361 U.S. 98 (1959).

In Terry v. Ohio, 392 U.S. 1 (1967), the Supreme Court indicated that a stop and frisk based upon facts which would lead to a founded suspicion that criminal activity was being engaged in by the defendant was lawful. (See also Wilson v. Porter, 361 F.2d 412, 9th Circuit, 1966).

The Court of Appeals in United States v. Walling, 486 F.2d 229, 235 (9th Circuit, 1973), quoting People v. Henze, 253 C. App. 2d 986 (1967), required that officers have a "rational suspicion" that "some activity out of the ordinary is or has taken place" which, in some fashion, is connected with the subjects under scrutiny and which, in some manner, suggests that the activity was criminal.

Under the foregoing requirements, it is apparent that the affirmative

allegations on which the government relies does not warrant the belief that the defendant was engaged in an unlawful enterprise or that the boat contained illegal merchandise. Specific articulable facts that a crime was being committed were not the product of Agent Burnett's observations. On the contrary, the activity observed was consistent with innocent behavior. It is a well-established principle of law that where events are as consistent with innocent activity as with criminal activity, a detention based on those events is unlawful.

The fact that a new boat is being taken from the water at night is certainly not suspicious. New boats need servicing on a regular basis and the fact that Agent Burnett never saw the boat being taken from the water is more than likely due to the hours he was working--8:00 A.M. to 4:00 P.M. In addition, from his location, Agent Burnett could not observe the numerous ramps in San Diego Bay from which a boat could be removed from the Bay.

Agent Burnett also related the fact that he had run petitioner Bordeaux's name on the computer and obtained a "hit". However, Agent Burnett never made any effort to follow up this inquiry to ascertain the validity of this information or extent of involvement or nature of the crime, if any. In United States v. Williams, 459 F.2d 44 (9th Cir., 1972), the Court held that a computer report is only as good as the information supplied by the reporting officer. Here there was no effort to validate any of the computer information.

The activity which is set out in the Statement of Facts indicates activity which is clearly consistent with innocence and was not sufficient to establish a founded suspicion upon which to base a lawful detention. United States v. Majourau, 474 F.2d 766, (9th Cir., 1973). It appears that Agent Burnett acted on nothing more than the suspicion condemned in Henry v. United States, 361 U.S. 98 (1959).

It is essential that the Court grant the requested Writ in order to clarify an area of law certain to be challenged time and time again within all jurisdictions adjacent to international borders. The facts of this case will continue to be presented given our proximity to international borders, the tremendous number of pleasure boats within numerous jurisdictions and our continued grappling with the slippery "founded suspicion" standard. It is respectfully requested that a uniform and specific opinion of the Court dealing with "founded suspicion", particularly in similar "boat and airplane" cases, be decided to enable the lower courts to more easily and efficiently deal with such cases.

II

The stop and search of petitioner's vehicle cannot be justified as a valid border search and therefore is not within one of the delineated exceptions

to probable cause or warrant requirements of the Fourth Amendment.

"Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347-357 (1967) and Coolidge v. New Hampshire, 403 U.S. 443 (1971).

The crossing of an international border is in and of itself an exigent circumstance allowing for warrantless searches to be reasonable within the meaning of the Fourth Amendment. However, this exception must be confined to its appropriate scope.

In Corngold v. United States, 376 F.2d 1 (9th Cir., 1966), the Court held that a statute containing broad delegation of authority to customs agents to search and seize imported merchandise could not be used to authorize a search which would otherwise be prohibited by constitutional provisions. "We have treated the outer limits of authority delegated by the statute as available only in border searches and there is nothing in the record to suggest that the search of appellant's package occurred in the course of an entry into this country."

To permit Title 19 USC Section 1581 (a) to authorize warrantless searches without the underlying justification for the original exception, namely, evidence of

international border crossing would be a serious departure from the reasoning of Corngold, supra.

The Almeida-Sanchez v. United United States, 413 U.S. 266 (1973), decision held that warrantless, random, roving stopping of automobiles by immigration officers in search of illegal aliens, not conducted at the international boundary or its functional equivalent or without probable cause, was a violation of an individual's rights protected by the Fourth Amendment. Although stopping short of declaring the statute under which the officers were operating unconstitutional, the Court did hold that it was unreasonably applied in regard to a search twenty miles from the border by agents who had no knowledge of any recent border crossing by the appellant or his vehicle. The language of the opinion eliminates the application of the statute except in cases where the search is conducted as the functional equivalent of a border search. Such warrantless searches of vehicles are unconstitutional unless conducted in such a manner as to be reasonably certain that virtually every vehicle searched will have just crossed the international border. United States v. Bowen, 500 F.2d 960 (9th Cir., 1974). The same must be logically applied to the present situation if pleasure boat enthusiasts are to enjoy any semblance of Fourth Amendment protection from governmental intrusions.

The facts of this case state very clearly that Agent Burnett had no facts or reasonable justification to believe

that the boat had ever left San Diego Bay, both the rented marina slip on Shelter Island and the "J" Street ramp being located within San Diego Bay. Furthermore, there was no testimony in the instant case that the defendants were ever closer than seven miles from the border or that any of the individuals had recently crossed the border. Without evidence of such a border crossing, this detention and search removed from the border area cannot fall within the extended border search trilogy of Alexander v. United States, 362 F.2d 379 (9th Cir., 1966); United States v. Weil, 432 F.2d 1320 (9th Cir., 1970); and United States v. Markham, 440 F.2d 1119 (9th Cir., 1970). Therefore, to sustain this detention and search as a border search would be contrary to the principles of Almeida-Sanchez v. United States, supra, and would allow for wholesale violations of the Fourth Amendment rights of citizens who frequent the many hundreds of pleasure boat basins which dot our coastline.

The government cannot attempt to justify the search herein by custom agents as anything but a border search because U.S. Customs Agents do not have general police jurisdiction. The court in U.S. v. Majourau, supra, citing U.S. v. Jackson, 423 F.2d 506 (9th Cir., 1970) said:

> "Moreover, customs agents 'are not, like local or state police, general guardians of the public peace.' They are customs agents, with duties and powers limited to activities

> of the type that the title implies."

It is imperative then that a concise delineation of the power of the customs agents to conduct such searches be made by this Court so that our jurisdictions can effectively protect the Fourth Amendment rights of pleasure boaters and water enthusiasts.

III

The evidence in the instant case was insufficient to support the finding of guilt beyond a reasonable doubt that petitioner possessed marijuana with intent to distribute.

The cases are uniform in their finding that in order to support a conviction for possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1), there must exist both knowledge of the contraband and dominion and control. In the present case, the government failed to show either dominion and control or knowledge of the contraband by petitioner, and unless mere conjecture is used, there are no facts to supply either.

The facts as related by Agent Burnett establish that a boat was registered to Jerry James Bordeaux, and a trailer was being pulled by a vehicle registered to Willford and Elizabeth

Bordeaux, both registered to the same address.

There is no other evidence to connect Jerry James Bordeaux with the boat on the day of its seizure. He was never seen on it, or even near it, other than at the time of the arrest. The two individuals described on the boat and in the van fit the description of the co-defendants, who plead guilty, but the description does not fit petitioner, who is in his middle thirties.

At the time of the arrest, petitioner Bordeaux never got out of the vehicle until ordered to do so, never got on the boat, and he was totally cooperative at the time.

The government relied primarily on the theory of constructive possession to establish the charge, because it is clear that petitioner Bordeaux was not in actual possession of the boat, nor had he been aboard the boat.

This Court has consistently reversed the convictions of individuals who were mere passengers in vehicles in which narcotics were found. United States v. Gardner, 475 F.2d 1273 (9th Cir., 1973); United States v. Lacefield, 468 F.2d 170 (9th Cir., 1972); United States v. Thomas, 453 F.2d 141 (9th Cir., 1971); Bettis v. United States, 408 F.2d 563 (9th Cir., 1969); Doherty v. United States, 318 F.2d 719 (9th Cir., 1963); Gonzales v. United States, 301 F.2d 31 (9th Cir., 1962); Arnellanes v. United States, 302 F.2d 603 (9th Cir., 1962).

In the present case, petitioner Bordeaux was not even in the same vehicle (the boat) in which the contraband was located. Further, there is no way he could have seen into the boat while remaining in the Chevrolet Blazer.

As pointed out in Evans v. United States, 257 F.2d 121, 126 (9th Cir., 1958), speculation, like suspicion, is not proof and may not be inferred from mere associations. Evans v. United States, supra; Ong Way Jong v. United States, 245 F.2d 392 (9th Cir., 1957).

Mere presence in the area where narcotics is discovered or mere association with persons controlling the location of drugs or property is insufficient to support a finding of possession. United States v. Martin, 483 F.2d 974.

Considering the tremendous number of similar cases involving suspects arrested within close proximity to contraband, it would be of national importance for this Court to enunciate the principles of "dominion and control" and sufficiency of evidence necessary to convict under said circumstances.

CONCLUSION

For the foregoing reasons, petitioner Jerry James Bordeaux respectfully prays that a writ of certiorari issue to review the decision below.

Dated: [illegible]

Respectfully submitted,

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DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JERRY JAMES BORDEAUX, *Defendant-Appellant.*	No. 75-2291 MEMORANDUM

[November 12, 1975]

Appeal from the United States District Court for the Southern District of California

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and FERGUSON,* District Judge

The evidence before the district court was sufficient for its determination that customs officers had clear founded suspicion to stop and interrogate the defendant. The stop being lawful, the marijuana was in plain view and its seizure proper.

Affirmed.

*Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

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APPENDIX A

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JERRY JAMES BORDEAUX, Defendant-Appellant.	No. 75-2291 O R D E R

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and FERGUSON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Dated: January 7, 1976.

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.